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IN THE

Supreme Court of the United States

October Term, 1970

No. 169

STEPHEN RADICH,

Appellant,

v.

PEOPLE OF THE STATE OF NEW YORK,

Appellees.

On Appeal from the Court of Appeals of the State of New York

BRIEF OF JOHN B. HIGHTOWER, KARL KATZ AND KENNETH G. DEWEY, *AMICI CURIAE*

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Interest of the *Amici*

The *Amici* are a group of individuals connected with organizations involved with the arts. John B. Hightower is Director of The Museum of Modern Art, Karl Katz is Director of The Jewish Museum and Kenneth G. Dewey is a member of the New York State Commission on Cultural Resources. They are committed to the encouragement and preservation of works of art and freedom of artistic

expression. Since the case at bar involves both freedom of artistic expression and the right to exhibit controversial works of art, they have sought and obtained the consent of the parties to the submission of this brief *amici curiae*. Through this brief, the *amici* seek to convey their belief that artists are entitled to the broadest possible latitude in their choice of subjects and use of material; and that commercial galleries and museums are entitled to the same freedom in exhibiting works of art. Painters and sculptors have traditionally contributed valuable insight on social and political issues of the times through their work, and have traditionally used materials they deemed appropriate to the subject matter. It is important that artists be free to work in this manner, and that their work be freely exhibited to the public. The *amici* intend no comment by this brief either on the artistic merit or political message of the particular works of art involved in the case at bar. They are concerned only with the implications of this case for freedom of artistic expression, and for freedom to communicate such expression by way of public exhibition.

Preliminary Statement

This Court is asked in this case to determine the effect of the First Amendment to the United States Constitution on Section 1425(16)(d) of the Penal Law of New York (presently codified as Section 136(d) of the General Business Law). That section provides as follows:

> "16. Any person, who * * *
>
> "d. Shall publicly mutilate, deface, defile, or defy, trample upon, or cast contempt upon * * * by * * * act, or

"f. Shall publicly carry or display any emblem, placard or flag which casts contempt, either by word or act, upon the flag of the United States of America, * * *

"Shall be deemed guilty of a misdemeanor; * * *

"This subdivision shall not * * * be construed to apply to a(n) * * * ornamental picture * * * on * * * which shall be printed, painted or placed, said flag, standard, color, shield or ensign disconnected and apart from any advertisement."

Appellant Stephen Radich is the proprietor of an art gallery in New York City. He was convicted in the Criminal Court of New York County on May 5, 1967, of violations of Section 136(d), because he displayed certain sculptures by an artist named Marc Morrel which utilized reproductions of the American flag in highly critical contexts. The New York Court of Appeals affirmed appellant's conviction by a vote of 5 to 2 (Chief Judge Fuld and Judge Burke dissenting). The majority took the position that "the act" of "flag defilement" involved could constitutionally be punished, because it might cause "arousement of passions likely to lead to disorder." The dissenters argued that a work of art is a symbolic form of expression which may not constitutionally be punished in the absence of "a showing that the public health, safety and well-being of the community is threatened." The case is before this Court on appeal from the decision of the New York Court of Appeals.

Questions to Which This Brief Is Addressed

This brief is addressed to two questions (1) whether works of art are a form of expression entitled to the same First Amendment protection as speech and writing and (2) whether works of art dealing with political subjects involving use of the flag should be treated differently than other works of art.

Summary of Argument

I. Works of visual art have traditionally been used to communicate ideas on current social and political issues.

II. Works of visual art are entitled to the protection of the First Amendment.

A. Works of visual art are direct communications entitled to the same First Amendment status as speech and writing.

B. Even if works of visual art are different from speech or writing, they are entitled to the protection of the First Amendment as non-verbal forms of expression.

III. The use of the flag in works of visual art does not justify loss of First Amendment protection.

ARGUMENT

POINT ONE

Works of visual art have traditionally been used to communicate ideas on current social and political issues.

Throughout history artists have used their work to engage in social commentary. They have expressed their concern for political, religious and social injustice in their paintings, drawings and sculpture.

> "The artist does not revel in the bizarre, neither does he lampoon for the sake of the idle jest nor try to titillate a jaded public. Rather he desperately seeks to engage the mind and spirit of the spectator, to bring him to a state of awareness that will permit no evasion. He forces the spectator to reexamine values, but he does not reject society. He feels alienated, but he does not relinquish hope. His work may be commentary, indictment, or denunciation, but on whatever level he chooses to act he grapples with the real issues of mankind, knowing that art is more than embellishment and that he can make visual man's follies and estrangement." R. Doty, *Human Concern/Personal Torment* 7 (1969).

During the sixteenth and seventeenth centuries many artists were deeply concerned with religious injustice, and the moral and spiritual decay of the clergy. The Church and the papacy were the social order, and the Protestant Reformation was a challenge to the established hierarchy. R. Shikes, *The Indignant Eye: The Artist as Social Critic* 13 (1969) [hereinafter cited as Shikes].

In "The Floating Conch" Hieronymus Bosch expressed his disdain for the gluttony and lasciviousness of the clergy (Appendix, p. A1) while in "Antichristus" by Lucas Cranach the Elder (Shikes, p. 14) and in "The Sale of Indulgences" by Hans Holbein the Younger, the artists expressed their dismay at the unchristian practice of the sale of papal indulgences (Appendix, p. A2).

Artists have not only used their work to comment upon religious themes but also to comment upon other social and political issues. In "The Unhappy Pair at Home" from "Marriage *à la mode,*" William Hogarth condemned the frivolity and boredom of mid-eighteenth century English social life (Shikes, p. 70). Hogarth was very much concerned with the social and political evils of his day. In "The Polling" he satirized a political system in which for a fee the feebleminded, the crippled and the dying are led to the polls to vote (Appendix, p. A3).

Significant political comment was also engaged in by nineteenth century artists. In nineteenth century France, Honoré Daumier satirized the greed, self-satisfaction and self-aggrandizement of legislatures in his famous "The Legislative Paunch" (Appendix, p. A4). Daumier also attacked the injustices perpetrated by courts of justice and the roguery and amorality of the legal profession in a series of lithographs created between 1845 and 1848 entitled "Les Gens de Justice". In one of the series, "Hunger is no excuse for robbery", the portly judge demonstrates no mercy for the starving thief (Shikes, p. 170).

In the United States in the second half of the nineteenth century political spoof and satire flourished in artists'

works. Indignation at the power and influence of big industry and the monied trusts on government can be seen in Joseph Keppler's "The Bosses of the Senate" (Shikes, p. 319). Thomas Nast, the prominent American cartoonist, directed much of his political criticism toward the corruption and influence of the Tammany "Boss", William March Tweed. In "Tammany Ringdom", Nast depicted the Mayor of New York City on the throne and Tweed and his cohorts as the real powers behind the throne (Appendix, p. A5). "Corruption and degradation prompted Thomas Nast to create images of evil. Through caricature, with its distortion of ugly reality and mockery, he made travesties of politicians, statesmen and the clergy. The images from his pen provoked laughter, disgust and eventually, reform." Doty, *Human Concern/Personal Torment, supra.*

Artists expressed their indignation in the nineteenth century on subjects ranging from the slave trade in France, (See Géricault's sketch for "The Slave Trade," Appendix, p. A6) to the social inequities in Spain where the rigid order decreed at birth who was to be rich and who was to be poor for life. (See Goya's "What a stupidity to assign them destinies in childhood," Appendix, p. A7). In the twentieth century, American artists have protested lynchings and bombings in the South (See Paul Cadmus' "To the Lynching," Appendix, p. A8 and Charles White's "Birmingham Totem," Appendix, p. A9) and legal injustice in the North (See Ben Shahn's "Passion of Sacco and Vanzetti," Appendix, p. A10).

Some subjects, such as the plight of the poor and the insanity of war have been of constant concern to artists throughout the world for hundreds of years. In "Peasant

Monument''. Albrecht Dürer expressed sympathy for the peasants' uprising in Germany in 1525 which culminated in the Peasants' War (Shikes, p. 39). In Jean Francois Millet's ''The Diggers'' (Shikes, p. 205), the artist's compassion for the peasant is strongly expressed. In Franz Kupka's ''The Cog'' (Shikes, p. 221) and William Gropper's ''Sweatshop'' (Shikes, p. 340), the plight of the worker is depicted.

From Goya to Picasso, from the Napoleonic Wars through World War II and Vietnam, artists have attacked the cruelty and destruction occasioned by war. (See Goya's ''Executions of the Third of May, 1808,'' Appendix, p. A18; Goya's ''This is worse,'' Appendix, p. A11; Honoré Daumier's ''The Dream of the Inventor of the Needle-gun,'' Appendix, p. A12; Georges Rouault's ''My sweet homeland, what has become of you?'' Appendix, p. A13; Picasso's ''Guernica,'' Appendix, p. A16; Käthe Kollwitz's ''The Parents,'' Appendix, p. A14; Otto Dix's ''Wounded,'' Appendix, p. A17; and Chiam Koppelman's ''Vietnam,'' Appendix, p. A15).

Because the artist thus expresses himself through his work, the implications of the case at bar extend far beyond one particular sculptor's use of the flag in his constructions. If the conviction below is upheld by this Court, the traditional practice of artists expressing themselves on controversial subjects through materials and symbols appropriate to the subject, will be limited; and the artists' freedom generally to express himself through his work will be threatened. It is not beyond the realm of possibility for governmental authority to prohibit paintings of the human anatomy as obscene or to prohibit vivid collages or con-

structions employing totalitarian symbols as a form of disrespectful attack on those in power. At the same time, speech and writing of the same import would necessarily be permitted. Such special treatment of works of art would directly contravene the spirit and intent of the First Amendment.

Indeed, it would be ironic for painting and sculpture to receive less protection than speech or writing. The intense sensitivity of artists to injustice, their independence of mind and integrity of vision, their special ability to perceive and peacefully transmit profound truths is, if anything, entitled to greater encouragement and protection.

POINT TWO

Works of visual art are entitled to the protection of the First Amendment.

A. Works of visual art are direct communications entitled to the same First Amendment status as speech and writing.

"[T]he First Amendment's basic guarantee is of freedom to advocate ideas." *Kingsley International Pictures Corporation* v. *Regents of the University of the State of New York*, 360 U. S. 684, 688 (1959). As this Court said in *Terminiello* v. *Chicago*, 337 U. S. 1, 4 (1949):

> "The vitality of civil and political institutions in our society depends on free discussion. As Chief Justice Hughes wrote in *De Jonge* v. *Oregon*, 299 U. S. 353, 365, it is only through free debate and free exchange of ideas that government remains responsive to the will of the people and peaceful change is effected. The

> right to speak freely and to promote diversity of ideas and programs is therefore one of the chief distinctions that sets us apart from totalitarian regimes."

Because of the importance and value of freedom of expression to our society, the communication of ideas protected by the First Amendment is not limited to words alone. Although the use of words to express ideas has traditionally been protected, *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" et al.* v. *Attorney General of Massachusetts,* 383 U. S. 413 (1966); *Terminiello* v. *Chicago, supra,* so has the use of motion pictures. *Interstate Circuit, Inc.* v. *City of Dallas,* 390 U. S. 676 (1968); *Freedman* v. *Maryland,* 380 U. S. 51 (1965); *Kingsley International Pictures Corporation* v. *Regents of the University of the State of New York, supra; Burstyn* v. *Wilson,* 343 U. S. 495 (1952).

In *Kingsley International Pictures Corporation* v. *Regents of the University of the State of New York, supra,* 360 U. S. at 687, the appellant, a motion picture distributor, was denied a license by the State Board of Regents to exhibit "Lady Chatterley's Lover" under a New York licensing statute, N.Y. Education Law §§122 and 122-a (McKinney 1953) which required the denial of a license to motion pictures in which acts of sexual immorality are portrayed as desirable or acceptable patterns of behavior.

This Court held (360 U. S. at 688, 689):

> "What New York has done, therefore, is to prevent the exhibition of a motion picture because that picture advocates an idea—that adultery under certain circumstances may be proper behavior. Yet the First Amendment's basic guarantee is of freedom to advo-

cate ideas. The State, quite simply, has struck at the very heart of constitutionally protected liberty.

"It is contended that the State's action was justified because the motion picture attractively portrays a relationship which is contrary to the moral standards, the religious precepts and the legal code of its citizenry. This argument misconceives what it is that the Constitution protects. Its guarantee is not confined to the expression of ideas that are conventional or shared by a majority. It protects advocacy of the opinion that adultery may sometimes be proper, no less than advocacy of socialism or the single tax. And in the realm of ideas it protects expression which is eloquent no less than that which is unconvincing."

The protection accorded freedom of expression in speeches, books and motion pictures applies as well to paintings and sculptures. The First Amendment protects the advocacy of ideas, regardless of the means through which they are advocated. *Burstyn* v. *Wilson, supra,* 343 U. S. at 503. There is absolutely no distinction which would protect motion picture expression of ideas, and permit inhibitions of ideas through painting or sculpture.

On the contrary, if strong speech, vivid writing and graphic film drama are protected, it follows, *a fortiori,* that the more passive forms of communication and expression (e.g. pantomime) are also protected. Painting and sculpture clearly are communications more passive than motion pictures, speech or writing—and therefore at least as protected.

The First Amendment does not confer absolute rights. It does not protect obscenity nor communications which may lead to an immediate breach of the peace. *Roth* v.

United States, 354 U. S. 476 (1954); *Chaplinsky* v. *New Hampshire,* 315 U. S. 568 (1942). But there is a greater likelihood that a breach of the peace will ensue from a demogogic speech before an excited audience than from an exhibition of a painting or sculpture no matter how offensive or unpopular the views expressed by the artist. Clearly, hortatory words are more active than works of art; yet both are communications, and words are protected by the First Amendment. Works of art cannot receive less favorable treatment. The protection due to art was recognized in the landmark case of *United States* v. *One Book Entitled "Ulysses",* 72 F. 2d 705, 708 (1934):

> "It may be that Ulysses will not last as a substantial contribution to literature, and it is certainly easy to believe that, in spite of the opinion of Joyce's laudators, the immortals will still reign, but the same thing may be said of current works of art and music and of many other serious efforts of the mind. Art certainly cannot advance under compulsion to traditional forms, and nothing in such a field is more stifling to progress than limitation of the right to experiment with a new technique. The foolish judgments of Lord Eldon about one hundred years ago, proscribing the works of Byron and Southey, and the finding by the jury under a charge by Lord Denman that the publication of Shelley's "Queen Mab" was an indictable offense are a warning to all who have to determine the limits of the field within which authors may exercise themselves."

B. Even if works of visual art are different from speech or writing, they are entitled to the protection of the First Amendment as non-verbal forms of expression.

This Court has consistently held that the protection of the First Amendment extends to non-verbal as well as verbal communications. *Brown* v. *Louisiana,* 383 U. S. 131 (1966); *Garner* v. *Louisiana,* 368 U.S. 157 (1961); *Thornhill* v. *Alabama,* 310 U. S. 88 (1940).

In *Brown* v. *Louisiana, supra,* 383 U. S. at 141, 142, this Court approved a sit-in to protest the segregation of public library facilities in Clinton, Louisiana, stating:

> "We are here dealing with an aspect of a basic constitutional right—the right under the First and Fourteenth Amendments guaranteeing freedom of speech and of assembly, and freedom to petition the Government for a redress of grievances. * * * As this Court has repeatedly stated, these rights are not confined to verbal expression. They embrace appropriate types of action which certainly include the right in a peaceable and orderly manner to protest by silent and reproachful presence, in a place where the protestant has every right to be, the unconstitutional segregation of public facilities."

In *Tinker* v. *Des Moines Independent Community School District,* 393 U. S. 503 (1969), this Court held that school officials could not prohibit the wearing of armbands by high school and junior high school students during school hours to protest United States involvement in Vietnam. Since the wearing of armbands constituted a non-verbal expression of political views unaccompanied by disruptive

or disorderly behavior, it was entitled to the protection of the First Amendment.

A sculpture or any other work of visual art, is a form of expression unaccompanied by disruptive or disorderly behavior. Whether or not it protests the war in Vietnam, or contains any other political or social message, it is entitled to the protection of the First Amendment.

POINT III

The use of the flag in works of visual art does not justify loss of First Amendment protection.

Visual artists communicate through works of art (Point I, *supra*). They are entitled under the First Amendment to express themselves freely—i.e. to communicate freely through works of art (Point II, *supra*). For freedom of expression to be meaningful, the artist must be free to use representations appropriate to the subject matter. As a writer or speaker is entitled to his verbal image, the painter or sculptor is entitled to his visual image.

One may agree or disagree with the particular political view expressed by the works of art involved in the case at bar. But it is difficult to perceive why their display should be unlawful. If it is appropriate to write about the flag, and to speak about the flag, as this Court has recently held in *Street* v. *New York,* 394 U. S. 576 (1969), then it should follow that it is appropriate to represent the flag in painting and sculpture. If it is appropriate to sell books and make public speeches with the message that "the flag is being disgraced by the Vietnam War", it should follow

that it is appropriate to display paintings and sculptures conveying the same message, or other messages on politically controversial issues.

It is worthy of note that the American flag has been portrayed in numerous works of art and by many great artists, e.g. Jasper John's "Flags" (Appendix, p. A20), Tom Wesselman's "The Great American Nude II" (Appendix, p. A21), and Nobuaki Kojima's "Untitled" (Appendix, p. A19). The flag has been used as a decorative motif, as a symbol of America or of patriotism, and as a means of identifying the subject matter of a work as American. Certainly no valid distinction under the First Amendment can be made which would permit representations of the flag by artists in praise or glorification of America but not in criticism. Yet, that is the danger of the decision in the case at bar.

As Chief Judge Fuld stated in his dissenting opinion below, *People* v. *Radich,* 26 N.Y. 2d 114, 128 (1970):

> "It is evident that the only reason why these works of Morrel were singled out for prosecution was not because the flag was used in the sculptures but solely because of the particular political message which those sculptures were intended to convey. In a very real sense, therefore, it was not the artist's *act* of making use of the flag which is being punished but solely the *protest* or the political views he was seeking thereby to express."

If Judge Fuld is right, the decision below must be reversed. And Judge Fuld can only be wrong if distortion by visual artists in their representation of the flag is to be

banned altogether. That would make of the flag a sacred object, not to be depicted unless absolutely accurately, and, presumably not to be spoken or written about in a distorted or disparaging manner. The result would be to protect the flag as object, rather than symbol, beyond the protection from sacrilege granted, in view of the First Amendment, to the most sacred religious persons and objects. *Burstyn* v. *Wilson, supra.* S. I. Hayakawa was recently quoted regarding the flag in *Time* (July 6, 1970, at 15):

> "When a symbol becomes a fetish then you make the semantic error of confusing the symbol with what it is supposed to symbolize."

We respectfully submit that the decision below makes the flag a fetish. By applying §136(d) to display of the sculptures involved in the case at bar, without even inquiring whether display of the sculptures was accompanied by, or created, disorder, the lower Court struck at the very heart of artistic freedom of expression. [In fact, the exhibit by appellant Radich in the case at bar ran for two weeks prior to service of summons and for ten days thereafter with no disorder of any kind.] It confused peaceful communication entitled to the protection of the First Amendment with incitement to disorder purely because the flag was involved—thus making the flag more sacrosanct than religious objects. We respectfully submit that the flag desecration statute cannot be applied to the exhibition of visual works of art—consistently with the First Amendment—in the absence of a *concrete* showing of likelihood of disorder. Otherwise, visual works of art would be treated differently than other communications, and distorted flag representations would have to be banned alto-

gether. We submit that there is no reason either to treat paintings and sculptures differently from speech and writing; or to ban flag representations altogether.

Conclusion

The appellant's conviction below contravened his right to freedom of expression under the First Amendment, and should be reversed.

Respectfully submitted,

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December, 1970

"The Floating Conch." Hieronymus Bosch. 1562.

(Printed as page A1)

A1

"The Sale of Indulgences."
Hans Holbein the Younger. 1520.

(Printed as page A2)

A 2

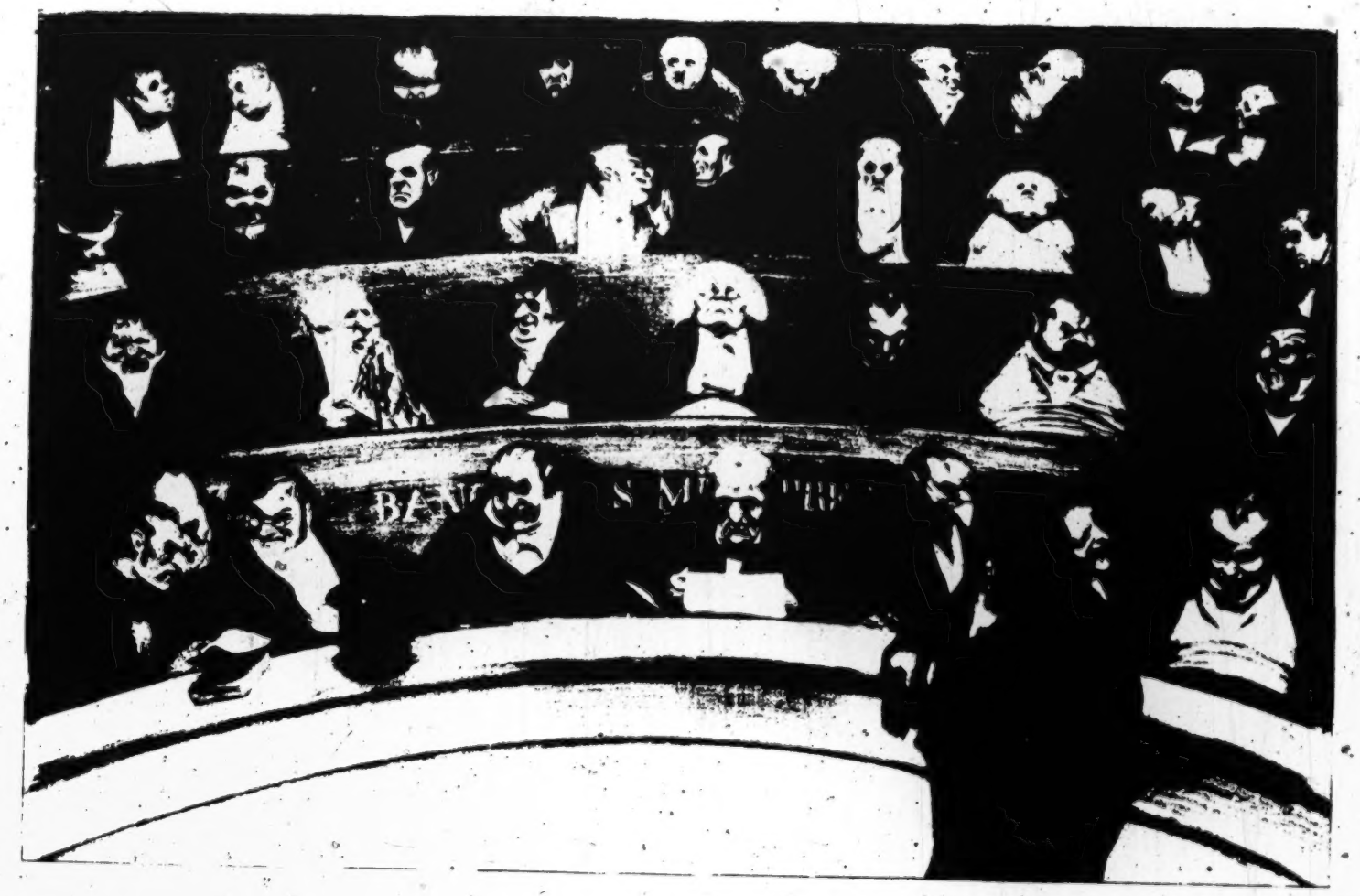
"The Polling." William Hogarth. 1754.

(Printed as page A3)

"The Legislative Paunch." Honore Daumier. 1834.

(Printed as page A4)

A4



"Tammany Ringdom." Thomas Nast. 1870.

(Printed as page A5)

A 5

THE POWER BEHIND THE THRONE.

HE CANNOT CALL HIS SOUL HIS OWN.

Th. Nast.

Sketch for "The Slave Trade."
Theodore Gericault. 1823.

(Printed as page A6)

A6

"What a stupidity to assign them destinies in childhood." Goya. 1818-24.

(Printed as page A7)

A7

13

¡Q.e Necedad! dar destinos en la niñez

108

"To the Lynching." Paul Cadmus. 1935.

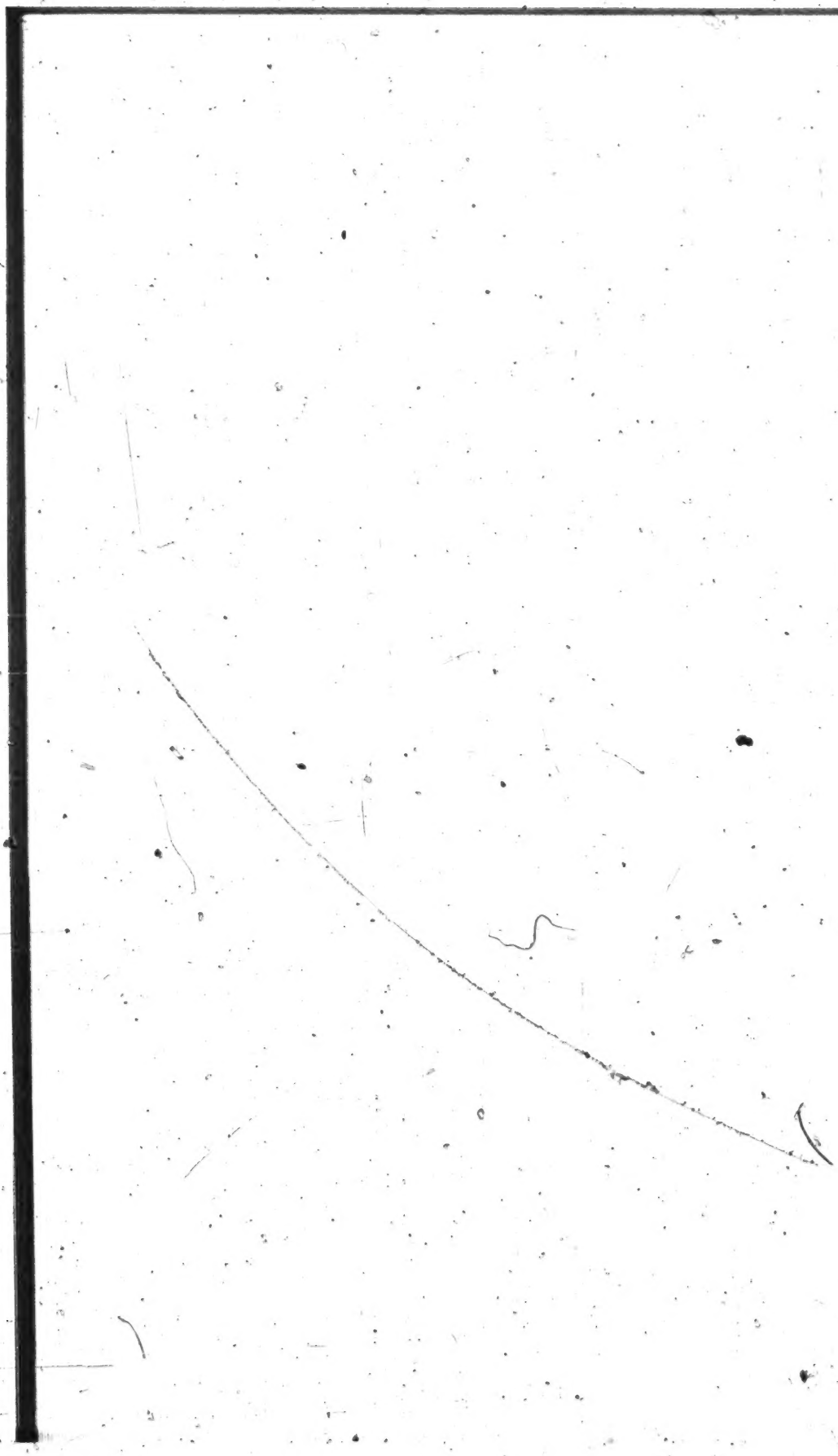
(Printed as page A8)

A8

"Birmingham Totem." Charles White. 1964.

(Printed as page A9)

A 9



"Passion of Sacco and Vanzetti." Ben Shahn. 1958.

(Printed as page A10)

IF IT HAD NOT BEEN FOR THESE THING, I MIGHT HAVE LIVE OUT MY LIFE TALKING AT STREET CORNERS TO SCORNING MEN. I MIGHT HAVE DIE, UNMARKED, UNKNOWN A FAILURE. NOW WE ARE NOT A FAILURE. THIS IS OUR CAREER AND OUR TRIUMPH. NEVER IN OUR FULL LIFE COULD WE HOPE TO DO SUCH WORK FOR TOLERANCE, FOR JUSTICE, FOR MAN'S UNDERSTANDING OF MAN AS NOW WE DO BY ACCIDENT. OUR WORDS - OUR LIVES - OUR PAINS NOTHING! THE TAKING OF OUR LIVES- LIVES OF A GOOD SHOEMAKER AND A POOR FISH PEDDLER-ALL! THAT LAST MOMENT BELONGS TO US- THAT AGONY IS OUR TRIUMPH.

"This is worse." Goya. Between 1810-20.

(Printed as page A11)

"The Dream of the Inventor of the Needle-gun."
Honore Daumier. 1866.

(Printed as page A12)

A 12

"My sweet homeland, what has become of you?"
Georges Rouault. 1927.

(Printed as page A13)

"The Parents." Kathe Kollwitz. 1923.

(Printed as page A14)

A 14

"Vietnam." Chaim Koppelman. 1965.

(Printed as page A15)

A 15

"Guernica." Pablo Picasso. 1937.

(Printed as page A16)

"Wounded." Otto Dix. 1924.

(Printed as page A17)

"Executions of the Third of May, 1808." Goya. 1814.

(Printed as page A18)

A 18

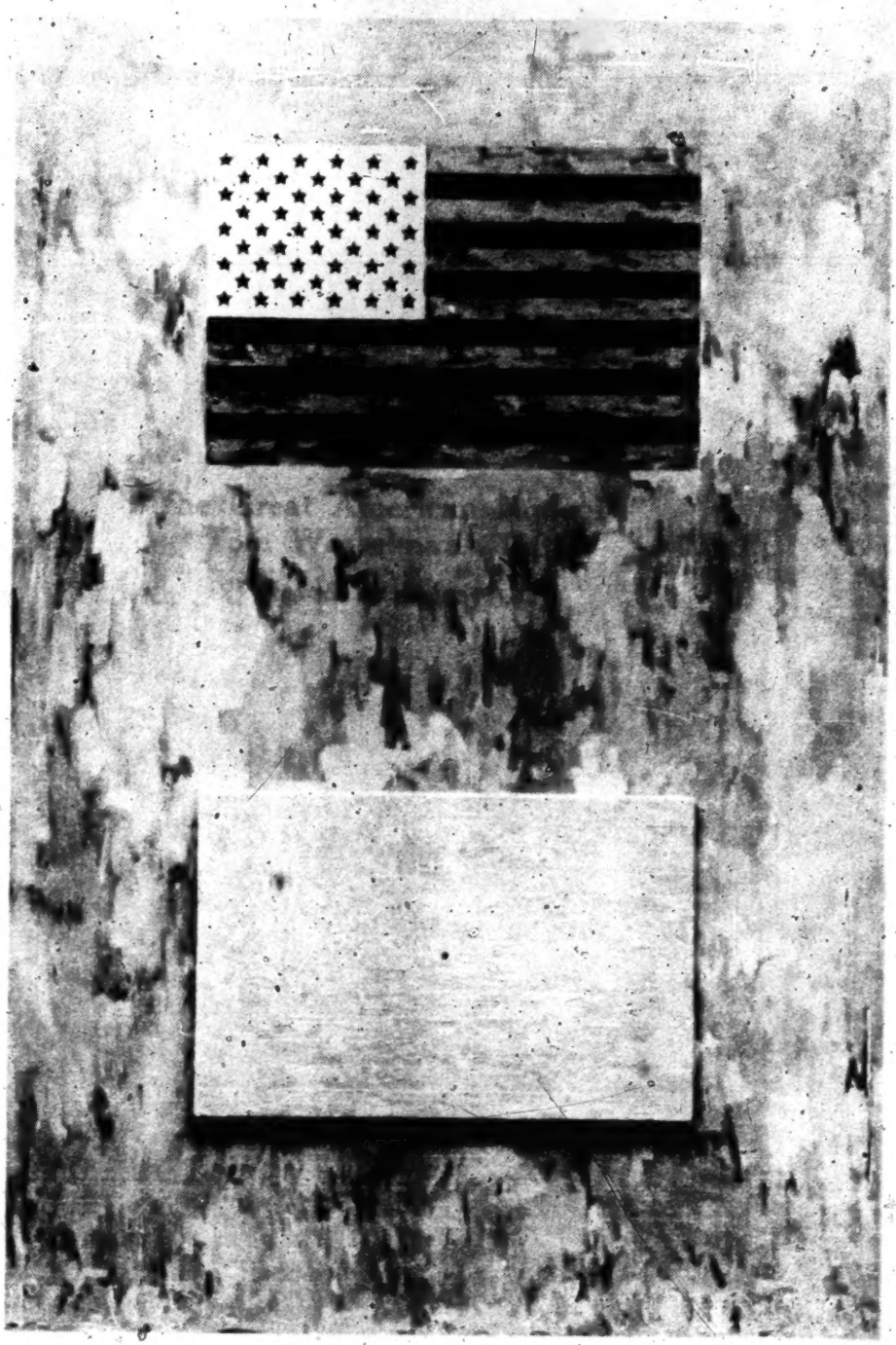
"Untitled." Nobuaki Kojima. 1964.

(Printed as page A19)

"Flags." Jasper John. 1965.

(Printed as page A20)

A 20



"The Great American Nude II."
Tom Wesselman. 1961.

(Printed as page A21)

A 21